

TESTIMONY

NATIONAL SECURITY ASPECTS OF S. 1712 THE EXPORT ADMINISTRATION ACT OF 1999

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Testimony of William Schneider, Jr. on the National Security

Aspects of S.1712, The Export Administration Act of 1999

Mr. Chairman and Members of the Committee:

It is a privilege to appear before this Committee to discuss the national security aspects of S.1712, the pending bill to renew the Export Administration Act. Exports are a matter of great importance to the vitality of the American economy, and are responsible in no small measure for its sustained high level of performance.

My remarks are focused on narrow dimension surrounding this important legislative initiative – its national security implications. My testimony today derives from my experience in the Federal government where I served as Under Secretary of State for Security Assistance, Science and Technology. In that post, I had both interagency export control policy responsibilities as well as management of the Department of State's role in export controls, both for dual use and US Munitions List items. In addition, I have served as a Member of two Congressional Commissions that have addressed the export control issue in the context of the proliferation of weapons of mass destruction (WMD) and the means of delivering them. Two years ago, I served as a Member of the *Commission to Assess the Ballistic Missile Threat to the United States* led by former Secretary of Defense, Don Rumsfeld. More recently, I served as a Member of the *Commission to Assess the Organization of the Federal Government to combat the Proliferation of Weapons of Mass Destruction*. The former Director of Central Intelligence, Dr. John Deutch, chaired this Commission. The Vice-Chairman was Senator Arlen Specter. This Commission addressed the question of the export control function and its role in US policy to combat the proliferation of weapons of mass destruction. The Commission delivered its final report to the Congress in July 1999.

The Post-Cold War Role of Export Controls

The role of export controls in US national security policy has changed fundamentally subsequent to the demise of the former Soviet Union in 1991. During the Cold War period, export controls were an important instrument to limit the access of the Soviet bloc to technology that could facilitate the modernization of their armed forces. The export control system was a multilateral one operated through an informal, but effective non-treaty based entity, the Coordinating Committee on Multilateral Export Controls (COCOM) based on US diplomatic property in Paris. The US participation in COCOM was supported by an aggressive diplomatic effort reinforced by a large-scale Intelligence Community collection, processing, and dissemination effort. The COCOM controls were effective, and forced the former Soviet Union and its allies to depend largely on indigenous technology for its defense modernization. The technology developed indigenously in the Soviet bloc proved inadequate to support its foreign policy aims. Its inability to modernize its scientific and industrial base was a contributing factor to the collapse of Soviet military power in the latter stages of the Cold War.

The diminished contemporary role of export controls is reflected in aggregate statistics of licensure. In the mid-1980s when I had interagency coordination responsibilities for export controls as an official of the Department of State, the Department of Commerce issued nearly 150,000 validated dual-use export licenses per year. In FY 98, the number of export licenses issued by the Department of Commerce declined to less than 12,000. This order-of-magnitude decline understates the scope and magnitude of the sweeping liberalization of export controls since the volume of high-tech trade has increased several-fold over the same period.

The decline in the relative importance of export controls in US national security policy reflects the change in the nature of post-Cold War security concerns. The massive edifice of Soviet military power and ambition has collapsed. Twenty-first century security concerns are now focused on a more amorphous amalgam of threats including state-sponsored terrorism and the proliferation of weapons of mass destruction and the means of delivering them. A monolithic adversary has been replaced by several regional powers whose military power is more narrowly focused, but yield little to the former Soviet Union in their hostility to the United States and its allies. It is the change in the nature of US post-Cold War security concerns and the changing sources of technology that animates that threats forcing a re-examination of the role export controls might play. This change will be the subject of my comments on S.1712.

The post-Cold War Proliferation of WMD and Their Means of Delivery

Since the 1980s, a fundamental change has taken place in the nature of the problem of proliferation – a change with profound implications for US export control requirements, and indeed, the role of export controls in US foreign policy. The worldwide trend toward democratic order, economic liberalism, and deregulation of advanced technology commerce has spurred a widely distributed boom in international trade. The broadening of the scope of international markets has in turn stimulated the globalization of manufacturing and service sectors to serve the global market. These developments have overwhelmingly served the interests of the United States in both economic and security terms.

These developments have also had a negative dimension to which public policy must respond. The globalization of advanced technology science and industry converged with the deregulation of international trade to diminish the obstacles posed to nations hostile to the US seeking to develop WMD and the means to deliver them.

The very technology that has contributed so much to American prosperity and security has paradoxically stimulated and facilitated WMD and missile proliferation. The fruits of the American command of the application of advanced civil sector technology for military applications became apparent during *Operation Desert Storm* in the Gulf War in 1991, and more so during *Operation Allied Force* – the seventy-eight day air campaign in Kosovo in 1999. Previous calculations of conventional military power were swept away by the efficacy of the military applications advanced sensors, signal processing, materials, telecommunications, and precision geo-spatial location technologies. The ironic effect of the eclipse of conventional

“analog” military power has been to stimulate the development of weapons of mass destruction and the means to deliver them by a number of states hostile to the United States.

Frustrated at their inability to achieve their regional ambitions, Iran and North Korea for example, have turned to the development of WMD and long-range missiles to offset their inability to use conventional military power to deter American (and allied) involvement in regional disputes. Their ability to do so has been abetted by the liberalized policy and regulatory environment of the post-Cold War period. The US Department of Energy has declassified obsolete (but functional) information about nuclear weapons design, manufacturing, and testing as part of its contribution to post-Cold War openness. This “obsolete” (to the US) information is now widely available, and has made the US the leading provider of scientific and industrial information on the military applications of atomic energy. Iran and North Korea are able to bypass the arduous process of nuclear weapons design and development permitting them to focus their attention on gaining access to fissile material.

Similarly, information made widely available relating to the production and weaponization of chemical and biological agents has produced a surge in development activities despite powerful international norms arrayed against such programs. Indeed, among nations hostile to the United States, international norms against WMD and long-range missile development have been honored more in their breach than in their observance.

Liberalization in access to aerospace-related technologies, abetted by a breakdown in the portions of the US export control system still in place after the Cold War, has permitted the accelerated development of long-range ballistic and cruise missiles as well by nations hostile to the US. So rapid have been these developments that the Rumsfeld Commission was forced to conclude in 1998 that:

The warning times the US can expect of new, threatening ballistic missile deployments are being reduced. Under some plausible scenarios – including re-basing or transfer of operational missiles, sea and air-launched options, shortened development programs that might include testing in a third country, or some combination of these – the US might well have little or no warning before operational deployment.

Today, nations among the poorest on earth have or are well on the road to the development and deployment of WMD and the means to deliver them. The changing nature of the post-Cold War security environment has created a community of interests among nations seeking WMD and the means to deliver them, despite widely divergent political and strategic interests. Close collaboration between Iran, North Korea, and Pakistan, for example, is serving to accelerate WMD and delivery system development, and is contributing to the creation of a WMD and missile-manufacturing infrastructure that may be the source of subsequent proliferation in the decades ahead.

Changes in the Sources of Technology for Military Application

The rapid advances being made in virtually every scientific and industrial discipline is a phenomena that is being diffused to virtually every corner of the globe as a consequence of the process of globalization. The availability of advanced technology and its extraordinarily rapid development cycle has changed the source of advanced military capabilities. In the past, the defense sector produced advanced technology for military applications. In areas such as aviation, microelectronics, telecommunications, materials, etc., these developments eventually “trickled down” to the civil sector. Over the past decade or two, these circumstances are being reversed. The specialized defense sector now creates advanced military capabilities from technologies primarily developed for civil applications.

The defense sector is now a minor participant in the market for advanced civil sector technology products, and for the most part, must draw from what it can find in the civil sector to meet military requirements. In many cases, civil sector requirements are more demanding than military requirements. Civil sector product development cycles are measured in months rather than years or decades, as is the case with major defense platforms. The defense sector is increasingly becoming an industry whose primary function is to transform and integrate widely available technology into advanced military capabilities that can assure the US of military superiority.

This development has important implications for national defense. The United States will be able to develop very sophisticated military capabilities more rapidly and at much lower cost than would be the case if such technologies were developed by the defense sector. However, adversary states will enjoy access to the same technology base available to the United States. Differences in future military capabilities will depend less on access to military-unique technologies than on unique ways in which these technologies are transformed and integrated to produce advanced military capabilities.

These circumstances also create a new environment with important implications for US export control policy. As enabling (civil sector) technology for military applications become ubiquitous, military capabilities rather than technologies relevant for military applications need to become the focus of export control activities. In a *de facto* manner, this is taking place. While dual-use export licenses issued by the Department of Commerce have declined by more than an order of magnitude in the past decade, munitions licenses issued by the Department of State have declined by only twenty percent over a similar period despite a fifty-percent decline in international arms transfers. If this characterization of current circumstances is accurate, do export controls on dual-use technologies have any role in supporting US post-Cold War national security objectives, and what are its implications for S.1712?

The Defense Science Board has undertaken a recent study of the phenomena. See Donald A. Hicks, Chairman, *Report of the Defense Science Board Task Force on Globalization and Security*, (Washington: Office of the Under Secretary of Defense for Acquisition and Technology, December 1999).

Can Export Controls Serve a Constructive Post-Cold War Public Policy Purpose?

The dynamics of the post-Cold War international economy and the evolution of the sources of military advantage have raised questions about the role and efficacy of export controls as an instrument to support US foreign policy objectives. The US has an enduring interest in preventing or slowing the spread of WMD and the means to deliver them. An interest in preventing or slowing adversary access to advanced conventional military capabilities has also emerged as a post-Cold War objective of public policy. Both the legislative and executive branches of government on numerous occasions have affirmed this interest in law, policy, and regulation.

Achieving these public policy purposes cannot be achieved through the instrumentality – broad multilateral export controls – which were used to such good effect during the Cold War. If export controls are to achieve a public policy purpose worth the effort, such controls must be far more focused than was the case during the Cold War. The Deutch-Specter Commission summarized US post-Cold War export control needs.

The export control system needs to adapt to these changes if it is to contribute to combating proliferation effectively. This can be accomplished by refocusing the export control system from broad-based technology-driven controls to limiting or denying access to proliferation-enabling technologies by potential proliferators. Reinforced by the coordinated employment of other policy instruments available to the US government, ranging from diplomacy to arms transfers, export controls can provide leverage to these initiatives to achieve US goals in combating proliferation.

In affirming the utility of a modernized system of export controls for combating proliferation, the Deutch-Specter Commission cited three ways in which export controls contribute to the efficacy of US policy to combat proliferation.

First, the very process of developing export controls within a nation or negotiating export controls multilaterally, educates government, officials and individual companies about technologies, materials, and equipment that could be diverted for proliferation-related purposes. doing so facilitates the broad-based voluntary compliance by exporters without which no system could function effectively.

Second, export controls and the enforcement apparatus that supports them can prevent dangerous goods from reaching their intended destinations. In this connection, the Commission acknowledges

the determination and creativity in enforcing export controls by US officials.

Third, export controls provide a legal basis for punishing violators. For those exporters who fail to comply, violation of export controls may result in fines, denial of export privileges, or in extreme cases, prison sentences.

If a modernized export control apparatus can serve the more specialized post-Cold War national security concerns of the United States, then the pertinent question is whether or not S.1712 contributes to the modernization of US export controls.

National Security Aspects of S.1712

My remarks will not address the legislative and statutory history of the Export Administration Act (EAA) and its relationship to the national security aspects of export controls. Comments will be limited to areas where S.1712 could be improved with respect to post-Cold War US national security interests. The recent report of the Cox Committee identified a number of areas where improvements in the US export control system are needed. Some – especially increased penalties for non-compliance – are incorporated in S.1712. However, a number are not.

- End-use verification and post-delivery verification: The provisions of S.1712 that provide for end-use verification are weakened by a failure to provide an institutional basis for taking national security considerations into account in a decision to continue controlled exports to end-users refusing end-use verification. Moreover, repeal of the provisions of the National Defense Authorization Act of Fiscal Year 1998 that require post delivery verification to Tier 3 countries of high performance computers (HPCs) is unhelpful in combating proliferation as these nations are among the most proliferation-sensitive destinations. The Deutch-Specter Commission strongly affirmed the need for post-shipment verification. Its recommendation [5.19] stated:

The Bureau of Export Administration should expand its post-shipment verification to encompass technologies of proliferation concern and Congress should ensure that the Bureau has the resources and the discretion it needs to implement an effective and aggressive post-shipment verification program.

Hon. Christopher Cox, Chairman, *Report of the Select Committee on US National Security and Military/Commercial Concerns with the People's Republic of China*, (Washington: GPO, 1999).

- *Diminished impact of national security concerns in the National Security Controls List:* While S.1712 provides for consultation with the Secretary of Defense on establishing the content of the national security control list, only the President can overrule decisions made by the Secretary of Commerce. Moreover, determinations of foreign availability (which the neither the Department of Commerce or Defense has a database to support) and mass-market decisions can be made without consultation with the Secretary of Defense. This too requires presidential intervention to reverse. The institutional reality of Executive branch decision-making renders engaging interagency conflict infrequent and reversals a rare event. As a practical matter, the process established in S.1712 will diminish the priority of national security concerns in export control decisions to sensitive destinations. A procedure as noted in (6) below to mandate incorporation national security expertise in such decisions could mitigate the problem.
- *Ambiguity concerning “deemed export” provisions:* The growing importance of labor mobility in the international economy creates new opportunities for proliferation-sensitive data to be transferred to inappropriate end-users. An important way of dealing with this issue in current law and regulation requires employees who are non-US persons to obtain an export license for them to gain access to export controlled information in the United States. While the legislation is ambiguous on this point, some readings of its provisions could lead one to conclude that current law and regulation in this respect is being weakened. Such an outcome would undermine the ability of the US to promote such practices among US allies who share similar export control issues arising for increased labor mobility in the high tech sector.
- *Procedural impediments to the introduction of national security concerns into export licensing decisions:* The limitations of the interagency appeal process described in (2) above are retained in S.1712, but rendered more difficult to introduce because of a series of procedural impediments. To the institutional impediments to appealing an export licensing decision to the President are added a set of process improvements intended to eliminate unneeded foreign policy controls and compress license processing time. The President has only thirty days to appeal a mass market decision of the Secretary of Commerce, while HPC export decisions are reduced from the present 180 days (in the FY 98 NDAA) to 60 days. The evidentiary and policy aspects of such decisions are often very difficult, and it is unlikely that complex issues could be fully resolved in this period. The cumulative impact of procedural and institutional characteristics make it unlikely that national security considerations will receive due consideration under the provisions now embedded in S.1712.

The *Report of the Defense Science Board, op cit.*, pp. 36-7 recommends that a foreign availability data base be established, but no initiative has yet been undertaken to do so, nor does S.1712 provide authorization or resources for such an effort.

- *Differential PRC-Hong Kong export control standards*: The basis for maintaining differential export control standards between the PRC and Hong Kong is an expectation that the autonomy of Hong Kong's export control institutions can be preserved. While there is some evidence that this expectation is justified, there are also some ominous portents that place this expectation at risk. First, there have been numerous legal challenges to Hong Kong's autonomy within the PRC's legal and political system, though these challenges have not directly affected the export control function. Second, several countries of proliferation concern have stepped up their activity and presence in Hong Kong. For example, North Korea has recently established a diplomatic presence in Hong Kong. In light of reported PRC assistance to North Korea's ballistic missile program(s), the establishment of a diplomatic conduit for the diversion of controlled technologies, equipment, and technical data to North Korea from Hong Kong would be difficult for Hong Kong authorities to interdict, given their limited autonomy.
- *Foreign availability and mass market determinations*: As noted previously, the Secretary of Commerce has the authority to make foreign availability and mass market determinations under the bill without consultation with the Secretary of Defense. Only a successful appeal to the President can reverse such a decision. There is no US government database to support foreign availability decisions, nor does one appear to be contemplated. The provisions of S.1712 that permit the Department of Commerce to make foreign availability decisions do not provide for the incorporation of appropriate USG expertise. An alternative approach that would assure that appropriate inter-agency expertise was incorporated in the decision process would be to require the affirmative support of the three cabinet level officers of the national security agencies – the Secretaries of Defense and State, and the Director of Central Intelligence. Foreign availability and mass market determinations could not be made in the face of an objection from a Cabinet officer of the three national security officers unless reversed by the President.

Conclusion and recommendations

The export control system is in urgent need of modernization. The current system neither meets the needs of US exporters, nor reflects a capacity to incorporate contemporary national security concerns. The need to do so has been affirmed by several Executive and Legislative branch studies, commissions, and reports. S.1712 is an appropriate vehicle to do so. However, in its present form, S.1712 fails to adequately provide for US national security needs that address the proliferation issue. To be sure, export controls cannot carry the entire burden of combating proliferation, or even a major part of it. Other measures must be employed in conjunction with export controls if overall national security objectives are to be achieved. Nevertheless, export

This is also true in the Department of State in support of its responsibilities to manage exports of products and services on the US Munitions List. Although President Clinton's 1995 *Conventional Arms Transfer Policy* declaration affirmed authority to use foreign availability considerations in USML licensing decisions, no resources have been provided to develop such a database.

controls can support other measures to combat proliferation. As a result, the opportunity to modernize and thereby strengthen the contribution of export controls should be taken by modification of S.1712.

Mr. Chairman, this concludes my testimony. I am prepared to respond to questions raised by you and other Members of the Committee.